February 28, 1994

REPORT TO THE HONORABLE
MAYOR AND CITY COUNCIL

PROPOSED AMENDMENTS TO CHARTER SECTION 12
PERTAINING TO FILLING COUNCIL VACANCIES
FOR ELECTION ORDINANCE FOR JUNE 7,
1994/ITEM NO. 331 ON THE MARCH 1, 1994 DOCKET

On February 22, 1994, the Council requested that the City Attorney draft language to amend Charter section 12 for the June 7, 1994, ballot. The proposed amendment would, among other things, restrict an appointed councilmember's eligibility to run for office. Restricting a person's eligibility to run for office raises legal issues that are explained briefly in this report.

ANALYSIS

Currently, Charter section 12 provides for the Council to cause an election to be held if a vacancy occurs for any reason in the office of a Council District. If, however, a vacancy occurs for any reason in the office of a Council District within 100 days of an upcoming regular municipal election, the Council may fill the vacancy by appointment.

The Council has requested this provision be amended, subject to voter approval, so that if a vacancy occurs with less than one (1) year remaining in the term the Council will be required to appoint a person to fill the vacant seat and the person appointed will be ineligible to run for that office for the next succeeding term. If the vacancy occurs with more than one (1) year remaining in the term, the Council will be required to cause an election to be held within ninety (90) days unless a regular election is scheduled to be held within 180 days.

First, it should be noted that research has failed to provide any clear cut answers regarding the constitutionality of the proposed amendment restricting an appointed councilmember's eligibility to run for office. On the one hand, some case law prohibits a municipality from placing qualifications on running for office. Courts have invalidated a number of qualifications on holding office including excessive residency requirements. Qualifications to hold or run for elected office are often subject to strict scrutiny by courts, because of the impact on

the fundamental right to vote and the right to run for public office. When an election requirement is subjected to strict scrutiny it must be shown that the requirement is necessary to accomplish a compelling government objective. However, "not every candidate restriction affects the right to vote sufficiently to require a strict equal protection review of the restriction. The task of federal courts is to examine in a realistic light the extent of and nature of their impact on voters." Mancuso v. Taft, 476 F.2d 187, 193 (1973).

On the other hand, some case law suggests that a charter city may impose reasonable restrictions on elections and the right to hold office. Lindsay v. Dominguez, 217 Cal. 533 (1933) (overruled on other points). What constitutes a reasonable restriction has not been clearly defined. However, in Kinnear v. City and County of San Francisco, 61 Cal. 2d 341 (1964), an "appointive officer or employee" forfeited his office when he became "a candidate for election to any public office." The court in Kinnear found this restriction to be unreasonable.

A charter city possesses powers both specifically enumerated within the constitution, such as the power to control the "conduct of city elections," and those things considered a municipal affair. California Constitution, Article XI, Section 5, Subdivision (b). There is no definition of a "municipal affair."

One issue which has recently been determined to be a municipal affair is that of term limits for city councilmembers. In Cawdrey v. City of Redondo Beach, 15 Cal. App. 4th 1212 (1993), the court held that "term limits for elected officials do constitute a municipal affair, and thus are within the scope of the powers granted charter cities by Article XI, Section 5, Subdivision (a). In addition, imposition of such limits does not violate other constitutional protections." Cawdry at 1216-17. In determining what constitutes a municipal affair, the California Supreme Court recently provided guidance in Johnson v. Bradley, 4 Cal. 4th 389 (1992), and California Fed. Savings & Loan Assn. v. City of Los Angeles, 54 Cal. 3d 1 (1991). In these cases the court stated that to determine whether an issue is a municipal affair the court must determine whether the city action conflicts with state law, and if so, whether the subject matter at issue is of statewide concern. If it is of statewide concern, the City is precluded from acting. The court's duty is to '"allocate the governmental powers under consideration in the most sensible and appropriate fashion as between local and state legislative bodies.'" Johnson v. Bradley, 4 Cal. 4th at 400 (citations omitted). We believe that a court would find that establishing a

restriction on an appointed councilmember's eligibility to run for office for that same seat is a municipal affair and well within a city's power to adopt in a charter.

SUMMARY

Arguably, the City's desire to ensure a fair and competitive election, to encourage qualified candidates to run for office, and to eliminate an unfair advantage for incumbents are all compelling reasons for the City Council to propose, and the voters to approve, a charter restriction on an appointed councilmember's eligibility to run for that appointed seat. These objectives would constitute sufficient grounds to withstand a court's "strict scrutiny" under a constitutional challenge. Additionally, the proposed restrictions on an appointed person's eligibility to run for office would arguably be treated as a municipal affair and well within a charter city's authority to regulate, similar to recently upheld term limits for charter cities.

Respectfully submitted,
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